**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| MONIQUE JENKINS, Plaintiff, | : | CIVIL ACTION |
| | : | NO. 00-CV-609 |
| v. | : | |
| PHILADELPHIA HOUSING AUTHORITY, Defendant. | : | |

**MEMORANDUM**

BUCKWALTER, J. October 24, 2001

Presently before this Court is Defendant's motion for Summary Judgment pursuant to Fed. R. Civ. P. 56. Because Plaintiff demonstrates, with regard to one claim against Defendant, a prima facie case of retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et. seq., ("Title VII"), the motion is GRANTED in part and DENIED in part.

## I. STATEMENT OF FACTS

Plaintiff Monique Jenkins has been employed by Defendant Philadelphia Housing Authority ("PHA") since September 25, 1995. Plaintiff is employed as a lobby monitor, a position that requires her to work in a booth to screen visitors to public housing units operated by Defendant, and to handle emergency situations. PHA police officers generally check in with lobby monitors, provide temporary relief so the monitors can take breaks, and respond to emergencies witnessed by lobby monitors. Sometimes lobby monitors work in pairs; at other

times they work alone. Lobby monitors have both civilian and PHA police officer supervisors above them in the chain of command.

Plaintiff alleges that she witnessed the sexual harassment of her fellow lobby monitor, Frances McLaughlin, by PHA police officer Jonathan Knuckles from November 1995 until February 1996. McLaughlin reported the sexual harassment on February 24, 1996, and within a few days Plaintiff was interviewed by a PHA investigator regarding the allegations. Over two years later, in May 1998, McLaughlin filed a Title VII action against Defendant, alleging a sexually hostile work environment and retaliation. On November 6, 1998, Plaintiff was deposed in that case. Shortly thereafter, on December 22, 1998, Plaintiff filed an EEOC charge against Defendant, alleging retaliation against her for being a witness for McLaughlin during PHA's investigation and in connection with her subsequent lawsuit. Plaintiff filed an additional EEOC charge in 1999 alleging additional retaliatory conduct on the part of Defendant. Plaintiff filed the above-captioned suit on February 2, 2000, alleging that Defendant retaliated against her in violation of Title VII.

Plaintiff contends that Defendant and its agents retaliated against her in a host of ways over a five-year period. In summary, plaintiff alleges that: (1) PHA police officers failed to relieve her at her booth so she could take breaks; (2) in January 1998 and February 2001, PHA police officers failed to respond promptly to her calls for emergency assistance; (3) in July 1997 she was falsely accused of making an improper 911 call for police assistance; (4) in January 1998 PHA police officers failed to respond promptly to her calls for assistance due to a fire, and accused her of making a fire report that was unfounded; (5) on November 6, 1998, on the day of her deposition in the McLaughlin case, PHA transferred her to its North Division; (6) PHA

police officers and others falsely reported her as being AWOL from her booth on four occasions after her deposition, and locked her out of her booth on two occasions; (7) PHA supervisors accused her of violating its sick leave policy; (8) from 1998 to the present PHA treated her differently from her fellow lobby monitors in a laundry list of additional ways described in her deposition, see Plaintiff's 2/28/01 Deposition, pp. 53-97; (9) she herself was sexually harassed, and (10) she was denied various promotions in 1997, 1998, and 1999.

## II. LEGAL STANDARD

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

If the moving party establishes the absence of the genuine issue of material fact, the burden shifts to the nonmoving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The nonmoving party, however, cannot "rely merely upon bare

assertions, conclusory allegations or suspicions" to support its claim. Fireman's Ins. Co. v. Du Fresne, 676 F.2d 965, 969 (3d Cir. 1982). To the contrary, a mere scintilla of evidence in support of the nonmoving party's position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant. Liberty Lobby, 477 U.S. at 252. Therefore, it is plain that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a situation, "[t]he moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 323 (quoting Fed. R. Civ. P. 56(c)).

## III. DISCUSSION

To establish a prima facie case of retaliation under Title VII, a plaintiff must show that: (1) he or she engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997).

However, as a prerequisite to a suit under Title VII, a plaintiff must first file a claim with the EEOC and receive a right-to-sue letter from the Commission. See Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1210 (3d Cir. 1984). Under Title VII, the ordinary time for filing a charge with the EEOC is 300 days from when the discriminatory or retaliatory

conduct took place. See West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995). One exception to this rule is the continuing violations theory, which allows a plaintiff to pursue a Title VII claim for discriminatory conduct that began prior to the filing period if he can demonstrate that the act is a part of a pattern of discrimination on the part of the defendant. Id. Specifically, to demonstrate a continuing violation, a plaintiff must first show that at least one discriminatory act occurred within the 300-day period, and second, must show that the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." Id. at 755.

Defendant does not dispute that Plaintiff engaged in protected activity. Defendant claims that, even if the evidence is viewed most favorably to Plaintiff, she cannot establish a prima facie case of retaliation because Plaintiff (1) has not exhausted her administrative remedies as to certain claims, (2) was not subject to an adverse employment action attributable to Defendant, and, alternatively, (3) cannot demonstrate a causal link between any such action and the protected activity. Plaintiff counters that all her claims are either based on acts within the 300-day filing period or are preserved under the continuing violations theory. She also argues that if the evidence is viewed most favorably to her, she has demonstrated that she has been subjected to an adverse employment action with a causal linkage to her protected activity.

**A. Alleged Adverse Employment Actions Within The 300-Day Filing Period**

Regardless of whether the continuing violations theory is applicable to acts outside the 300-day filing period, the Court must first determine if Plaintiff can demonstrate a prima facie act of retaliation within the 300-day filing period, since as to continuing violations, "the crucial question is whether any present violation exists." Id. at 755 (quoting United Air

Lines, Inc. v. Evans, 431 U.S. 553 (1977)) (emphasis in original). In the context of a retaliation claim, if no prima facie case can be demonstrated within the 300-day filing period, summary judgment is appropriate. See, e.g., Curran v. Southeastern Pennsylvania Transp. Auth., No. 97-CV-81211999, 1999 WL 79504 (E.D. Pa. January 21, 1999), aff'd., 191 F.3d 444 (3d Cir. 1999) (dismissing entire claim for retaliation under 42 U.S.C. § 1983, including claims based on acts outside the statute of limitations period, because Plaintiff could not demonstrate a prima facie act of retaliation within the period); Nash v. University of Kansas Med. Ctr., No. 97-2285-KHV, 1998 WL 230961 (D. Kan., April 14, 1998), aff'd., 166 F.3d 1221 (10th Cir. 1999) (granting summary judgment as to entire Title VII retaliation claim, including claims based on acts outside the 300-day period, because Plaintiff could not demonstrate a prima facie act of retaliation within the period).

Therefore, the Court will analyze the claims of retaliation that Plaintiff alleges occurred within the 300-day period in her Brief in Opposition to Defendant's Motion for Summary Judgment, accompanying declaration, and supplement to her Brief. See Plaintiff's Brief at pp. 16-20, Plaintiff's Declaration ("Decl."), and the supplement to Plaintiff's Brief (enclosing Plaintiff's 2/28/01 Deposition, pp. 53-97).[1] On the record before the Court, all of these claims, save Plaintiff's claim regarding her work hours, (1) are claims for which administrative remedies have not been exhausted; (2) do not rise to the level of an adverse employment action; or (3) are based on a portion of Plaintiff's declaration that will be stricken from the record. Summary judgment will be granted as to these claims, as they cannot form the

1. Since Plaintiff filed her initial EEOC charge on December 22, 1998, Plaintiff's 300-day filing period dates back to February 25, 1998.

underlying basis for a prima facie case of retaliation under Title VII. However, Plaintiff's claim of retaliation based on her work hours remains.

1. Claims for Which Administrative Remedies Have Not Been Exhausted

As noted earlier, as a prerequisite to a suit under Title VII, a plaintiff must first file a claim with the EEOC and receive a right-to-sue letter from the Commission. See Howze, 750 F.2d at 1210. The scope of the ensuing federal court action is generally defined by that of the EEOC charge. More specifically, "the proper analysis for determining whether a Title VII plaintiff has satisfied the administrative prerequisites to bring suit in federal court is whether the acts complained of were fairly within the scope of the EEOC complaint and the ensuing investigation." Parsons v. Philadelphia Coordinating Office of Drug & Abuse Programs, 822 F. Supp. 1181, 1184 (E.D. Pa. 1993) (citing Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976)). However, as the EEOC filing requirement is not jurisdictional in nature, it is subject to waiver, estoppel and equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

Plaintiff has not exhausted her administrative remedies for her claims of (1) sexual harassment; (2) failure to promote; and her claim mentioned in her deposition that (3) she was not paid worker's compensation on a few occasions.

As to her sexual harassment claim, Plaintiff indicated the nature of her discrimination on both EEOC charges by marking only the box entitled "retaliation," and not "sex." Facts alleging a sexual harassment claim were not included in either of the EEOC charges, or in the complaint commencing this lawsuit. Similarly, with regard to her claims of failure to promote and worker's compensation, these acts of retaliation were not alleged on the

face of either of Plaintiff's two EEOC charges, or, again, in the complaint. There is simply nothing in the record to indicate that the EEOC investigations included or reasonably should have included these claims. Furthermore, there are no equitable considerations on the record which might toll the filing requirement, as Plaintiff was aware of all of these claims when she filed her second EEOC charge in 1999. Summary judgment is appropriate under these circumstances. See, e.g., Zerebnick v. Beckwaith Mach. Co., No. 95-0008, 1996 WL 233763 at * 7 (W.D. Pa. Mar. 7, 1996) (granting summary judgment on sexual harassment claim not within EEOC charge for retaliation); Parsons, 822 F. Supp. at 1184 (granting summary judgment on failure to promote claim not contained within EEOC charges for retaliation and for racial discrimination).

2. Claims That Do Not Constitute Adverse Employment Actions

Plaintiff alleges a wide range of retaliatory conduct on the part of Defendant. However, such conduct constitutes an "adverse employment action" under Title VII only if it "alters the employee's 'compensation, terms, conditions, or privileges of employment,' deprives him or her of 'employment opportunities,' or 'adversely affect[s] his [or her] status as an employee.'" Robinson, 120 F.3d at 1300 (citing 42 U.S.C. § 2000e-2(a)). Consequently, "'not everything that makes an employee unhappy' qualifies as retaliation, for '[o]therwise, minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a [retaliation claim].'" Id. (quoting Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996)). Job termination, however, is not a requirement for a finding of adverse employment action – certainly, less severe action can suffice.

Plaintiff sets forth many claims that very clearly fail to reach the level of an adverse employment action. Her allegations that PHA police officers made negative comments about her, that she was not driven to a physical therapy session one time when she was injured on the job, and that she was not given messages about her child being sick on a few occasions do not rise to the level of an adverse employment action; neither do allegations that she must show her supervisor a doctor's note when she is out sick, that she is inconvenienced by not receiving her work schedule promptly, that certain supplies are missing from her booth, or that she was locked out of her booth on two occasions.[2]

Plaintiff describes a few additional claims that are more substantial, but that continue to fall short of the mark. She claims to have been verbally reprimanded for contacting her union, however, "unsubstantiated oral reprimands" do not rise to the level of an adverse employment action. See Robinson, 120 F.3d at 1301. Although she claims that Defendant "tried" to place her on sick pay abuse, her testimony that she was never disciplined for such sick pay abuse prohibits a finding of an adverse employment action. See Plaintiff's 2/28/01 Deposition, p. 59. Additional claims, largely detailed in her declaration, that she cannot perform her job properly because her supervisor does not come by her booth, are unsupported by specific facts that detail how the terms and conditions of her employment have been materially altered. On the record before the Court, such claims do not rise to the level of adverse employment actions.

2. In addition, although Defendant does not so argue, Plaintiff has not exhausted her administrative remedies with regard to many of these claims. In any case, as a matter of law they do not constitute adverse employment actions.

Two of Plaintiff's additional claims present even closer questions. Plaintiff alleges specifically that her transfer to the North Division on November 6, 1998 was an adverse employment action, as that division was less geographically convenient for her. Regarding that same issue, in her declaration she alleges more generally that she is constantly asked to move her post within her division instead of being provided more stable work assignments. However, the record is undisputed that by February 3, 1999, Plaintiff was working back in her preferred South Division. More generally, the record is undisputed that it is common practice to move lobby monitors from site to site on an as-needed basis. See Deposition of Delano Stones, pp. 7, 11. Finally, there is nothing in the record to indicate that Plaintiff's assigned shift, days off, pay or responsibilities changed depending on site at which she works. In light of these facts, these allegations do not amount to an adverse employment action.

A second claim that presents a close question is Plaintiff's allegation that she was falsely reported as AWOL on four occasions since her deposition in the McLaughlin case. In her declaration, Plaintiff asserts that she can be fired for three such offenses, and that she is sure she is being set up to be fired in retaliation for her protected activity. Of course, Plaintiff's conclusory speculation cannot form the basis of an adverse employment action against her. Furthermore, the Third Circuit recently instructed that even a written reprimand (albeit a temporary one) does not meet the requirement for an adverse employment action without evidence of how such a reprimand effected a material change in the terms of conditions of employment. A mere "presumed" effect is not enough. See Weston v. Commonwealth of Pennsylvania, 251 F.3d 420, 430-31 (3d Cir. 2001). In this case, the record does not indicate that these AWOL reports were placed in Plaintiff's personnel file, or that Plaintiff received any

discipline as a result of them. The record does not indicate that Plaintiff received anything less than a satisfactory performance evaluation during the relevant period. And, of course, Plaintiff continues to work for Defendant. Therefore, under these circumstances, with only Plaintiff's speculation and assertion that she could be fired for these reports, claims of being falsely reported AWOL in and of themselves do not qualify as adverse employment actions.

Summary judgment is appropriate as to each of these claims, which do not constitute adverse employment actions and therefore cannot for the basis for a prima facie claim of retaliation under Title VII.

3. Claim Stricken from the Record

Plaintiff submitted a sworn declaration in conjunction with her Brief in Opposition to Defendant's Motion for Summary Judgment. However, "[i]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment." Martin v. Merrell Dow Pharm., Inc., 851 F.2d 703 (3d Cir. 1988) (quoting Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572 (2d Cir. 1969)). Therefore, "when the affiant is carefully questioned on the issue, had access to the relevant information at the time, and provided no satisfactory explanation for the later contradiction" a subsequent affidavit does not create a genuine issue of material fact. Id. at 706. See also Hackman v. Valley Fair, 932 F.2d 239 (3d Cir. 1991).

In its Reply, Defendant urges that the Court strike ¶ 3 of Plaintiff's declaration because it conflicts with Plaintiff's earlier deposition testimony.[3] At her deposition on February 28, 2001, Plaintiff was specifically asked to make a list of all instances of retaliation against her since January 1998. See Plaintiff's 2/28/01 Deposition, pp. 53-55. Defendant's counsel was very specific, stating, "I want very single incident that you believe is retaliation..." See Plaintiff's 2/28/01 Deposition, p. 55. Plaintiff ended her list with "That's basically it." Id. Plaintiff was then questioned in depth about these alleged instances. Although Plaintiff eventually did describe a similar incident that occurred outside the 300-day filing period in January 1998, at no time did Plaintiff assert that police officers failed to respond to her call for emergency assistance when a strange man entered the building she was monitoring in February 2001. See Decl. ¶ 3. This specific event would have taken place just a few weeks before her deposition. Plaintiff goes on to baldly assert that this failure to respond to her has been the practice of PHA police officers since 1998. See Decl. ¶ 3. Considering Defendant's careful questioning and the circumstances, the Court finds that ¶ 3 of the declaration contradicts Plaintiff's deposition testimony. Plaintiff clearly would have known this information at the time of her deposition, and significantly has not offered any explanation whatsoever to the Court for this assertion in her declaration. Therefore, ¶ 3 of Plaintiff's declaration and the allegations contained therein are stricken from the record.

3. Defendant also argues that other portions of the declaration contradict Plaintiff's deposition, and asserts additional arguments to strike other portions of it. The Court need not consider these arguments (except for any arguments regarding Plaintiff's surviving claim regarding her work hours). The Court considers the other portions of the declaration in its analysis. However, viewed in the light most favorable to Plaintiff, for the reasons stated these portions of the declaration do not demonstrate prima facie adverse employment actions within the 300-day filing period for which administrative remedies have been exhausted.

4. Remaining Claim Regarding Plaintiff's Work Hours

Finally, Plaintiff asserts in her deposition and declaration that Defendant routinely required her (and her alone), without notice, to work beyond her normal shift until her relief arrived. In 1997 and 1998, she alleges, this extended work period sometimes equaled additional shifts. Since 1999, she asserts, she continued to be required to remain at her post if her relief was late, at times for an additional thirty to ninety minutes, and again without prior notice. Such action directed solely at Plaintiff, if true, could be considered to alter the "terms, conditions, or privileges" of her employment, and would therefore be an adverse employment action within the 300-day period to the extent the activity occurred on or after February 25, 1998.

Plaintiff claims that ¶ 2 of Plaintiff's declaration, in which these claims are made, should be stricken from the record because (1) it contradicts with Plaintiff's deposition testimony and (2) it contains a self-serving conclusion that these actions were taken against her in retaliation. However, when asked to list the actions taken against her, Plaintiff testified in her deposition that "if my relief calls out to this day, sometimes I am still not notified that I have no relief." Plaintiff's 2/28/01 Deposition, p. 54. Later, she testified in detail that under these situations, she is not permitted to lock up and leave her booth. See Plaintiff's 2/28/01 Deposition, pp. 92. Under these circumstances, the additional detail provided in Plaintiff's declaration does not contradict Plaintiff's deposition testimony. Furthermore, in concluding that such conduct could constitute an adverse employment act, the Court does not consider Plaintiff's self-serving and conclusory assertion in ¶ 2 that the conduct is part of the retaliation against her.

However, that such a statement exists in ¶ 2 does not require the Court to strike the related factual claims from the record.

Therefore, viewing the facts in the light most favorable to Plaintiff, one allegation of retaliation within the 300-day filing period rises to the level of an adverse employment action for which Plaintiff's administrative remedies have been exhausted. The Court now examines whether Plaintiff may recover for alleged claims of retaliation that occurred prior to the 300-day filing period through the continuing violations doctrine.

**B. Alleged Adverse Employment Actions Prior to the 300-Day Filing Period**

Although the ordinary time for filing a charge with the EEOC is 300 days from when the discriminatory or retaliatory conduct took place, see West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995), the continuing violations theory permits a plaintiff to pursue a Title VII claim for discriminatory conduct that began prior to the filing period if he can demonstrate that the act is a part of a pattern of discrimination on the part of the defendant. Id. Specifically, as noted above, to demonstrate a continuing violation, a plaintiff must first show that at least one discriminatory act occurred within the 300-day period and second, must show that the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." Id. at 755.

Courts have looked to three factors to help them decide whether a plaintiff has properly alleged a continuing violation. "The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring ... or more in the nature of an isolated work

assignment or employment decision? The third factor, perhaps of the most importance, is the degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights?" Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 482 (3d Cir. 1997) (quoting Berry v. Board of Supervisors of Louisiana State Univ., 715 F.2d 971, 981 (5th Cir. 1983)).

First, even before the Berry factors are applied, Plaintiff's claim that members of the PHA police force failed to relieve her for lunch and other breaks, like many of her claims within the filing period, is not an actionable adverse employment action. There is no evidence that Plaintiff was routinely forced to remain at her post as a result of this failure to relieve her – she simply called in and asked permission to leave, locked her booth, and took her break. Furthermore, there is no evidence that she was ever disciplined or reprimanded in any way for taking her breaks in this manner. Under these circumstances, the PHA police officers' alleged failure to relieve her, even assuming it is attributable to Defendant, is not an adverse employment action. Therefore, no claim based on this conduct is actionable even if it had taken place within the 300-day filing period.[4]

Applying the Berry factors, the continuing violations theory does not save Plaintiff's other claims that allegedly occurred outside the 300-day filing period, other than Plaintiff's claims that she was forced to work extra shifts in 1997 and 1998.

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4. Defendant advances a number of additional arguments regarding these alleged acts of retaliation by PHA police officers (as well as other allegations that PHA police officers failed to respond to plaintiff when she required emergency assistance), including that the acts cannot be attributed to Defendant because they were not carried out by, or with the knowledge of, Defendant's management or by Plaintiff's superiors. These arguments need not be considered by the Court since the allegations regarding Plaintiff's breaks are not adverse employment actions, and Plaintiff's "emergency assistance" allegations are not properly before the Court as continuing violations.

First, claims for which Plaintiff has not exhausted her administrative remedies – failure to promote, sexual harassment, and worker's compensation – are not saved by the continuing violations theory. Most fundamentally, each of these claims fail the first of the Berry factors because they are not similar in nature to any adverse employment action – or really any claim of retaliation at all – before the Court. See, e.g., Rush, 113 F.3d at 483 ("Rush's failure to promote claim is distinct from her sexual harassment claim and cannot be regarded as having been timely by reason of her other allegations of discriminatory treatment."). There is no evidence in the record that the sexual harassment and worker's compensation claims are based on anything more than one or two isolated incidents, in violation of the second Berry factor; and although her failure to promote claim refers to numerous jobs for which she was passed over, failure to promote claims are generally "discrete instances of alleged discrimination that are not susceptible to a continuing violation analysis." Id. at 483-84. Finally, the failure to promote and worker's compensation claims asserted by Plaintiff fail the third Berry factor as well, due to their permanent effects. These instances of retaliation should have triggered her awareness of and duty to assert her rights. Id. at 482.

Second, Plaintiff's "emergency assistance" claims – that (1) in January 1998, PHA police officers failed to respond promptly to her calls for police assistance; (2) in July 1997 she was falsely accused of making an improper 911 call for police assistance; and (3) in January 1998 PHA police officers failed to respond promptly to her calls for assistance due to a fire and accused her of making a fire report that was unfounded – similarly are also not saved by the continuing violations theory. Even assuming these acts are attributable to Defendant, to the extent these claims allege that Plaintiff was falsely reported as improperly calling for emergency

assistance, they fail to rise to the level of adverse employment acts by the same reasoning that false claims against Plaintiff for being AWOL also fail – there is no evidence that such reports, even if made, resulted in any discipline, reprimand, written notation in Plaintiff's personnel file, or had any tangible effect on her employment.

Applying the Berry factors to the remaining portions of these emergency assistance allegations, even assuming they are adverse employment acts attributable to Defendant, there is little similarity between the nature of the retaliatory acts claimed by Plaintiff within the 300-day filing period (for example, none of those claims involve emergency assistance from PHA police officers at all); there is even less similarity when limiting the analysis to the only adverse employment action within the 300-day period -- Plaintiff's claim regarding her work hours. Secondly, the limited frequency of these "emergency assistance" allegations makes them properly considered "discrete instances of alleged discrimination that are not susceptible to a continuing violation analysis." Rush, 1143 F.3d at 483-84. Lastly, and most importantly, the nature of these "emergency assistance" claims is such that they should have triggered Plaintiff's "clear awareness of and duty to assert" her rights. Id. at 482. After all, according to Plaintiff, she believed at the time that she was being retaliated against by PHA officers who were severely jeopardizing her physical safety.

In contrast, Plaintiff's allegation in her deposition and declaration regarding her required additional work shifts in 1997 and 1998 (to the extent the activity occurred before February 25, 1998) is recognizable as a continuing violation. This claim is almost identical to – in fact, it's a continuation of – the adverse employment action for additional work hours recognized within her 300-day filing period. Furthermore, Plaintiff testified that this claim was

not limited to a few specific instances. And it is reasonable that such a claim might not have triggered Plaintiff's clear awareness of and duty to assert her rights.

**C. Alleged Causal Link**

The Court must now consider the second disputed prong of the prima facie retaliation claim analysis: whether plaintiff can demonstrate a causal link between the alleged adverse employment action and her protected activity. Ordinarily, temporal proximity between the events plays a key role in determining whether a causal link may be demonstrated. See, e.g., Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989). However, more recently the Third Circuit defined other ways of showing such a link, such as demonstrating "an intervening pattern of antagonism." See, e.g., Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997). Similarly, the "proffered evidence, looked at as a whole, may suffice to raise the inference." See, e.g., Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280-81 (3d Cir. 2000).

In this case, Plaintiff cannot rely on any particular temporal proximity to her protected activity as the basis for a causal connection. However, viewing all the facts in the light most favorable to Plaintiff and granting her all reasonable inferences from those facts, the Court concludes that at a minimum, the record before it as a whole may raise the causal inference. Much of the alleged retaliatory conduct by various employees of PHA and her supervisors, even if such claims do not rise to the level of adverse employment acts, assist in demonstrating a pattern of antagonism with Plaintiff. Additional testimony, taken in the light most favorable to Plaintiff, supports the inference as well. For example, Plaintiff testified that her civilian supervisor, who went with her to her deposition in the McLaughlin case, told her that she was

"supposed to be a PHA witness." After her deposition, many PHA police officers (even if none specifically referenced were her supervisor) commonly referred to Plaintiff as a "snitch." Finally, according to Plaintiff, one of her police officer supervisors specifically involved with her work hours claim told her she was "not a team player," and that he does not come by her booth because "he does not want to be named in any more lawsuits." Viewed as a whole, all the evidence before the Court supports a possible casual link between the protected activity and the adverse employment action.

## IV. CONCLUSION

Plaintiff levels many claims of retaliation against Defendant, only one of which – Plaintiff's claim regarding her required additional work shifts and work hours extending back into 1997 -- is an actionable adverse employment action on the record before the Court. Furthermore, the record as a whole contains sufficient evidence of a possible causal link between this claim and Plaintiff's protected activity. As a result, summary judgment is denied to Plaintiff's claim regarding her required additional work shifts and work hours, and is granted as to Plaintiff's claims of retaliation based on all other conduct on the part of Defendant.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| MONIQUE JENKINS, | : | CIVIL ACTION |
| Plaintiff, | : | |
| | : | NO. 00-CV-609 |
| v. | : | |
| | : | |
| PHILADELPHIA HOUSING AUTHORITY, | : | |
| Defendant. | : | |

**ORDER**

**AND NOW,** this 24th day of October, 2001, upon consideration of Defendant Philadelphia Housing Authority's Motion for Summary Judgment (Docket No. 21); Plaintiff Monique Jenkins' Response thereto (Docket No. 23); Plaintiff's Supplement (Docket No. 24); Plaintiff's Errata Sheet (Docket No. 25); Defendant's Reply (Docket No. 26); and Plaintiff's Surreply (Docket No. 27), it is hereby **ORDERED** that Defendant's Motion is **DENIED** as to Plaintiff's claim of retaliation based on additional work shifts and work hours required of her.

**IT IS FURTHER ORDERED** that Defendant's Motion is **GRANTED** as to all of Plaintiff's other claims of retaliation based on Defendant's conduct. Summary judgment is entered in favor of Defendant and against Plaintiff as to these claims.

BY THE COURT:

RONALD L. BUCKWALTER, J.